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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 619

TRI-PHARMACY, INC., NANNIE V. COMPTON, AND JOSEPH A. CHASE, *Petitioners*

v.

COMMONWEALTH OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Nannie V. Compton, Joseph A. Chase, and Tri-Pharmacy, Inc., by their undersigned attorneys, respectfully pray for a writ of certiorari to the Supreme Court of Appeals of Virginia in the above cause, No. 5443 in the records of the Supreme Court of Appeals of Virginia.

JUDGMENTS BELOW

The judgment of the Circuit Court of Arlington County, Virginia is not reported. It appears at pages 22, 23, and 24 of the printed record used before the Supreme Court of Appeals of Virginia.

The opinion of the Supreme Court of Appeals of Virginia is reported at 127 S.E. 2d 89 and at 203 Va. 723, and in the appendix hereto. The opinion appears also in the certified record.

JURISDICTION

The opinion of the Supreme Court of Appeals is dated August 31, 1962; its date of entry is August 31, 1962.

No rehearing was requested.

The judgment of the Supreme Court of Appeals of Virginia is reviewable by this Court under the provisions of Title 28, U.S.C. Section 1257(3).

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewable by the Supreme Court as follows:
>
> (1) By appeal...
> (2) By appeal...
> (3) By writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or *where any title, right, privilege or immunity is specially set up or claimed under the Constitution*, treaties or statutes of, or commission held or authority exercised under the United States. June 25, 1948, c. 646, 62 Stat. 929." (Emphasis supplied.)

The petition is timely within the purview of Title 28, U.S.C., Section 2101(c) as enacted June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, Sec. 106, 63 Stat. 104.

QUESTIONS PRESENTED

1. Whether a search warrant, issued by state authorities and executed by state officers for the search of a private home, based upon an affidavit giving as facts for the issuance of the search warrant "personal observation of premises and information thought by the Police Department to be reliable," is invalid because in violation of the probable cause provision of the Fourth Amendment of the federal Constitution?

2. If invalid, the search and seizure thus conducted being unconstitutional, (a) Whether a state court has jurisdiction over such unconstitutionally seized property in a forfeiture proceeding or whether the forfeiture is defeated by such a seizure, and, (b) Whether the fruits of the unconstitutional search and seizure are admissible in a state forfeiture proceeding?

3. Whether, with the fruits of the unconstitutional search and seizure suppressed, there is any evidence in the record to support the finding of forfeiture and consequently whether the cause should be dismissed and the property returned to Miss Compton from whose home is was taken.

CONSTITUTIONAL PROVISIONS

Amendment IV of the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated

and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On October 21, 1957 Detective Leonard J. Burnett of the Arlington County Police applied for a search warrant to John Dalonas, Special Justice for the County Court of Arlington County. In his affidavit in support thereof, Detective Burnett gave as probable cause for the issuance of a search warrant the following facts:

"Personal observation of premises and information from sources thought by the Police Department to be reliable."

The search warrant was duly issued and pursuant thereto, immediately executed at 1800 South Cleveland Street, Arlington County, Virginia.

Detective Burnett, accompanied by several officers, approached the kitchen door of the premises, rang and was greeted by Nannie V. Compton, occupant and owner thereof. Detective Burnett made known his mission. Miss Compton asked whether he had a search warrant. He said he did and produced the same. Miss Compton forthwith waved him and his men into the premises, without examining the warrant.

Detective Burnett found Miss Compton and a maid in the kitchen in the process of preparing dinner, a dinner guest alone in the living room and Joseph A. Chase on the telephone in the den.

No lottery operation was in actual operation.

In the basement of the premises the police did find in a storeroom a shoe box containing records of alleged past lottery operations, a laundry bag containing records and money alleged to form a part day's operation, miscellaneous supplies of pencils, pads, erasures, rubber bands, etc., and also six electric adding machines. None of the adding machines were in operation or plugged in for operation. No person was in the basement.

In the den of the premises the police found a suitcase containing allegedly that day's operations. The bag was not open, nor had the contents been disturbed in any way. The police also found a filing cabinet and safe in the den. These contained money, miscellaneous personal records, cash register tapes and other records and monies of Tri-Pharmacy, Inc., for which Miss Compton was bookkeeper.

Shortly after the beginning of the search and seizure, Detective Burnett contacted the Commonwealth Attorney for Arlington County, who proceeded to the premises and participated in the search and seizure and the inventory of the property seized.

Subsequent thereto Joseph A. Chase and Nannie V. Compton were conducted to the Arlington County Police station where a warrant was obtained for their arrest and they were confined.

Joseph A. Chase and Nannie V. Compton were subsequently charged with a violation of Sec. 18-301 of the Code of Virginia, 1950 (now Section 18.1-340). They moved for suppression of the unconstitutionally sized evidence. The motion was denied and the defendants thereupon pleaded guilty.

On February 10, 1958 suit was brought by the Commonwealth of Virginia for the forfeiture of the property so seized. Joseph A. Chase, Nannie V. Compton, and Tri-Pharmacy, Inc., respectively, filed claims to the monies seized. Miss Compton filed a motion for the suppression of the evidence so seized and the return of it to her. This motion was denied at the trial.

The United States of America intervened herein to enforce liens, one of which arose from a 1952 assessment against Joseph A. Chase and others, and the other arose from an assessment based on the seizure herein involved.

The Circuit Court for Arlington County found for the Commonwealth, declaring a forfeiture, and the Supreme Court of Appeals of Virginia has affirmed as to the forfeiture.

The question of the suppression and return of the unconstitutionally seized evidence, a federal question under the Fourth Amendment of the Constitution, was first raised by a pre-trial motion of Nannie V. Compton (Printed Record before Supreme Court of Appeals of Virginia, pages 12-13). Having had no pre-trial ruling thereon, they were raised again by objection during trial, specifically denied by the court and exception duly taken to the said ruling (Printed Record before Supreme Court of Appeals of Virginia, pages 32-44; Transcript, pages 29-50). The matter was raised again at the end of the Commonwealth case by an oral motion to strike the testimony of Detective Burnett and the exhibits introduced through his testimony. The motion was denied by the court and an exception noted to the said ruling (Printed Record below, pages 55-58; Transcript, pages 103-108).

The jurisdiction of the trial court for forfeiture purposes was first raised by the court itself, and a ruling in favor of jurisdiction was handed down at the same time as the ruling on the admissibility of the evidence (Printed record below, pages 32-44; Transcript, pages 29-50).

On appeal, the questions presented herein were raised by assignments of error. Assignments of error on the question of lack of probable cause for the issuance of a search warrant were:

> "1. The court erred in failing to find that the search warrant executed on October 21, 1954 against 1800 South Cleveland Street, Arlington, Virginia, by the county police thereof was invalid under Title 19.1, Section 85, Code of Virginia, and Section 10, Constitution of Virginia because the affidavit on which the warrant is grounded and a fortiori the warrant does not show probable cause and further erred in admitting the said warrant and evidence found thereunder into evidence over the objections of the appellants.
>
> 2. The Court erred in failing to find that the search and seizure conducted at 1800 South Cleveland Street, Arlington, Virginia on October 21, 1957 by county police officers thereof under cover of an invalid search warrant was unconstitutional and illegal, violating the 14th Amendment of the Constitution of the United States and Section 11 of the Constitution of Virginia requiring due process of law and the 4th Amendment of the Constitution of the United States protecting the inhabitants from unreasonable searches and seizures as well as Section 10 of the Constitution of Virginia prohibiting searches and seizures based on general warrants."

Assignment of error No. 3 and 14 went to the question of admissibility, or suppression:

> "3. The Court erred in failing to find that evidence obtained under an invalid search warrant in violation of the Constitution of the United States and the Constitution and laws of the Commonwealth of Virginia was inadmissible in this cause, appellants having objected to the admission thereof, and was to be returned to the claimants."
>
> "14. The court erred in failing to find that the seized property should be returned to the occupant of the premises where the search and seizure occurred, i.e., to Nannie V. Compton."

Assignment of error No. 4 went to the question of jurisdiction:

> "4. The court erred in failing to find that property seized in a private home without a valid search warrant was not properly before the Court in this cause, a forfeiture proceeding."

The remaining assignments of error went to the sufficiency of the evidence (Printed Record below, pages 24-27).

REASONS FOR ALLOWING THE WRIT

The constitutional questions presented hereinbelow in regard to forfeiture proceedings have never been decided by this Court.

A. Pursuant to *Elkins* v. *United States* (1960) 364 U.S. 206, the search and seizure herein in question has been admitted by the United States to be unconstitutional under federal standards in a case involving the same search warrant, an opinion concurred in by the United States Court of Appeals for the Fourth Circuit (Nos. 8091-8092) and the United States Dis-

trict Court for the Eastern District of Virginia, Alexandria Division (Criminal Nos. 3515- 3516).

The United States admitted herein that the search and seizure was invalid as lacking probable cause (Printed Record below, page 33; Transcript, pages 31-32, 572, 573, and 599-600). The trial court agreed (Printed Record below, pages 94-95; Transcript, page 604).

The Supreme Court of Appeals of Virginia nevertheless held that probable cause for the issuance of a search warrant existed in the following statement of facts set forth in the affidavit:

> "Personal observation of premises and information from sources thought by the Police Department to be reliable."

Without more, it is plain that probable cause under federal standards is lacking.

The true question therefore is whether the state courts will be required to follow federal standards in interpreting the Fourth Amendment in the application of *Mapp* v. *Ohio,* (1961) 367 U.S. 643.

Only this Court can answer that question, and for this reason it should grant a writ of certiorari. Failure to consider the question at this time will vitiate the *Mapp* decision, supra.

There is a basic conflict between the interpretation of the Fourth Amendment by this Court, indeed the federal and state courts generally, and the Supreme Court of Appeals of Virginia. Only this Court can resolve this contradiction of views.

B. As to the question of jurisdiction of a court over property unconstitutionally seized and the effect of

such a seizure upon forfeiture, the federal courts are split and the state courts have barely ruled on the matter.

The United States Court of Appeals for the Third Circuit holds that unconstitutionally seized property is *not* subject to the jurisdiction of the court and that such a seizure defeats forfeiture. *United States* v. *Plymouth Coupe* (1950) 182 F.2d 180 (3rd Circuit). Other circuits hold to the contrary, *Strong* v. *United States* (1931) 46 F.2d 257 (1st Circuit), *United States* v. *Carey* (1939) 272 F.2d 492 (5th Circuit), *United States* v. *Pacific Finance Corp.* (1940) 110 F.2d 732 (2nd Circuit), although the First Circuit is wavering. *Interbartolo* v. *United States* (1962) 303 F.2d 34.

This uncertainty merits, indeed requires, the intervention of this Court.

Amongst the states only Utah has stated that an illegal seizure does not confer jurisdiction on a court in a forfeiture proceeding. *Utah Liquor Control Commission* v. *Wooras*, 97 Utah 351, 93 P2d 455. All other states have taken jurisdiction in such cases.

In the instant case the lower court assumed jurisdiction, citing *Dodge* v. *United States* (1926) 272 U.S. 530. In fact, the *Dodge* case merely holds that an unauthorized seizure may be ratified by the Government.

An unconstitutional seizure stands on a different ground. *Cook* v. *United States* (1933) 288 U.S. 102.

The trial court therefore has plainly erred on the matter of jurisdiction; the appeals court has not, in view of the finding of probable cause, reached this question.

To resolve a conflict between the various circuits and various states as to whether an unconstitutional search and seizure defeats a suit for forfeiture, the intervention of this Court is sought.

As to the admissibility of unconstitutionally seized evidence in a forfeiture proceeding, both the various states and the federal circuits are split.

The United States Court of Appeals for the Fourth Circuits holds that considerations leading to the suppression of evidence in criminal cases do not apply in forfeiture cases. *United States* v. *One 1956 Ford Tudor Sedan* (1958) 253 F.2d 725. Other federal circuits have ruled unconstitutionally seized evidence inadmissible in forfeiture proceedings. *United States* v. *Physic* (1949) 175 F.2d 338 (2d Circuit), *United States* v. *Plymouth Coupe* (1950) 182 F.2d 180 (3rd Circuit), *United States* v. *One 1946 Plymouth Sedan* (1948) 167 F.2d 3 (7th Circuit).

Amongst the states, rulings on this question of suppression are infrequent. Oklahoma has suppressed unconstitutionally seized evidence. *State ex rel Springer* v. *One 1940 Mercury 5 Passenger Coupe,* 223 P.2d 121, as has Texas, *Mosse* v. *State,* 332 S.W. 2d 383, and Mississippi, *One Pontiac Automobile* v. *State,* 72 So.2d 692. Under the non-exclusionary rule followed in most states, the matter had not even been raised.

To resolve a conflict as between the various circuits and the various states as to whether unconstiutionally seized evidence is admissible in a forfeiture proceeding, this Court should issue a writ of certiorari.

All the points heretofore raised deal with the Fourth Amendment of the federal Constitution. It does not seem possible to us that the interpretation of the Fourth Amendment by this Court can be disregarded

by state courts in favor of their own interpretation. The Fourth Amendment must mean the same thing to all, whether before a state or a federal court, whether in a civil or a criminal proceeding.

The matters heretofore raised in regard to forfeiture proceedings have never been directly presented to, or decided by, this Court.

C. The matter of the disposition of the property unconstitutionally seized is easily resolved. It should be returned to Nannie V. Compton, who has specifically requested the return of all property thus seized and from whose home the property was seized.

PRAYER

WHEREFORE your petitioners pray that a writ of certiorari issue to the Supreme Court of Appeals of Virginia, commanding that Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all the proceedings of said Supreme Court of Appeals in this cause, to the end that the proceedings and decision therein may be reviewed and determined by this Court; that the judgment of the Supreme Court of Appeals of Virginia may be reversed; and that petitioners be granted such other and further relief as may seem proper.

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APPENDIX

Present: Eggleston, C.J.; Buchanan, Snead, I'Anson and Carrico, JJ.

Record No. 5443

TRI-PHARMACY, INCORPORATED, et al.

v.

UNITED STATES OF AMERICA, et al.

Record No. 5444

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF VIRGINIA, et al.

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY

WALTER T. MCCARTHY, *Judge*

Opinion by Justice Archibald C. Buchanan

Staunton, Virginia, August 31, 1962

The questions presented by the appeals in these two cases are whether the Commonwealth had the right to forfeit certain money and other personal property on the ground that it was used in connection with the operation of a lottery, and whether such right, if established, is superior to the liens of the United States for taxes.

On October 21, 1957, officers of the Arlington county, Virginia, police department, possessed of a search warrant, entered the premises at 1800 South Cleveland street, Arlington county, and there seized the proprty in question. Thereafter, on February 10, 1958, the Commonwealth's

attorney for Arlington county filed an information [1] which recited the seizure of the property in connection with the operation of a lottery, as listed on Exhibit A filed with the information, consisting of forty-six numbered items, and prayed that said property be condemned as forfeited to the Commonwealth and disposed of according to law.

On April 21, 1958, Tri-Pharmacy, Incorporated, Nannie v. Compton and Joseph A. Chase, the appellants in No. 5443, filed separate petitions, claiming to own various of the items and praying that they be returned accordingly. Tri-Pharmacy claimed $6,697.68, which was item 41 of the Exhibit, together with some corporate records and an adding machine. Mrs. Compton asked for the return to her of all the seized property except what might be returned to Tri-Pharmacy; and Chase prayed to have returned to him the $3,889 listed as item 44 of the Exhibit. Mrs. Compton alleged that she was the owner and occupant of the premises; that the search warrant was invalid; that the seized items were not contraband or unlawfully in her possession. Chase also alleged that the search warrant was invalid; that the $3,889 was not contraband or unlawfully in his possession, and that if any lottery was at any time conducted on the premises he had no knowledge of it.

Prior to the filing of these petitions, to-wit: on October 21, 1957, the date the premises were entered and the property seized, separate warrants were issued against Joseph A. Chase and Nannie V. Compton, charging each of them with operation of a lottery and having possession of lottery slips in violations of § 18-301 of the Code (now § 18.1-340, 1960 Replacement Vol.), and each on November 7, 1957, entered a plea of guilty to the charge and each was sentenced accordingly.

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[1] Code 1950, § 19-11; now §§ 19.1-358, *et seq.*, 1960 Replacement Vol.

On April 2, 1958, the United States of America, appellant in No. 5444, filed its intervening complaint in which it alleged that in January, 1953, the Commissioner of Internal Revenue made an assessment of excise taxes against Joseph A. Chase and Nannie V. Compton in the total sum of $16,510.66, on the basis of wagers accepted by them during October, 1952; and that on November 4, 1957, the Commissioner made a jeopardy assessment of excise and occupational taxes against said Chase and Compton in the total sum of $75,167.39, on the basis of wagers accepted by them in the period of July, 1957, through October, 1957. It was alleged that notices of the assessments were duly given and filed, and the complaint prayed that the United States be adjudged to have a lien on said seized property for the amount of said taxes prior and superior to the claims of all other claimants.

The evidence, which was voluminous and was accompanied by many exhibits, was heard by the trial court *ore tenus* and thereafter, on May 23, 1961, the order now appealed from was entered in which it was found and adjudicated as follows:

That "the evidence in this case clearly demonstrates that a lottery was being operated on October 21, 1957 and that part of the operation was being conducted at 1800 S. Cleveland Street, Arlington, Virginia, by both Nannie V. Compton and Joseph A. Chase, and that, on that date, the items 1 through 44 listed on Exhibit "A" attached to and made a part of the information filed by the Commonwealth of Virginia, was used in connection with the promotion, operation or conduct of said lottery and was therefore, on that date, forfeited to the Commonwealth of Virginia";

And "that such forfeiture takes precedence over the claim of the United States Government for a tax lien upon said property."

It was further found and adjudicated that items 45 and 46 of Exhibit A, being two cloth bags containing altogether $1,229.11 and some small items, were not used in the operation of the lottery; that all parties had waived any claim thereto and that they be returned to Tri-Pharmacy, Incorporated; but that all of items 1 through 44, listed on said Exhibit A, were forfeited to the Commonwealth and to be disposed of as the law directs.

From this decree appeals were granted to Tri-Pharmacy, Incorporated, Nannie V. Compton and Joseph A. Chase, Record No. 5443; and to the United States of America, Record No. 5444, and the errors assigned by them raise the questions now to be considered.

Record No. 5443

The principal contentions of the appellants in this case are (1) that the search warrant under which the seizure was made was invalid and that the evidence thereby procured was inadmissible; and (2) that the evidence admitted was not sufficient to support the findings of the court.

The affidavit which was the basis for the search warrant and the warrant itself are printed in the margin.[2]

[Affidavit]

[2] Commonwealth of Virginia; County of Arlington, to-wit:

Before Me, John Dalonas Special Justice for the County aforesaid, this day appeared Det. Leonard J. Burnett and made affidavit as follows:

(1) Substantially the offense in relation to which search is to be made. Operation of a lottery, to wit, numbers game, in violation of Section 18-301 of the Code of Virginia.

(2) The material facts constituting probable cause for issuance of the warrant. Personal observation of premises and information from sources thought by the Police Department to be reliable.

(3) What is to be searched for under the warrant. Lottery tickets, including numbers slips, and any materials unlawfully made, provided or procured for drawing a lottery.

(4) The house, place, vehicle, or baggage to be searched. That

Appellants' argument is that the affidavit was not sufficient to show probable cause.

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certain premises known as 1800 South Cleveland Street, Arlington County, Virginia.

LEONARD J. BURNETT

Subscribed and Sworn To Before me this 21st day of October, 1957.

JOHN DALONAS
Special Justice

Certified to the Clerk of the Circuit Court of the County of Arlington.

JOHN DALONAS
Special Justice

11/6/57

[Search Warrant]

In the County Court of Arlington County, Virginia

To the Sheriff or any Police Officer of said County:

Whereas an affidavit has been filed with me pursuant to law and complaint made before me by Det. Leonard J. Burnett that a lottery, to-wit a numbers game is being operated in the premises described below, and that lottery tickets, including numbers slips and materials unlawfully made, provided or procured for drawing a lottery are believed to be concealed therein, and it appearing that there is reasonable and probable cause for such belief;

These are therefore to authorize and require you, in the name of The Commonwealth of Virginia, to enter in the day or night time the house, place, vehicle, or thing described as follows: All of a certain premises known as 1800 South Cleveland Street, Arlington County, Virginia and there diligently search for the said goods and bring the same and the person or persons in whose possession the same are found, before me to be disposed of or dealt with according to law.

Given Under My Hand and Seal this 21st day of Oct. 1957.

JOHN DALONAS
Special Justice

Section 19-30 of the Code of Virginia, 1950 (now § 19.1-85, 1960 Replacement Vol.), provides that no search warrant shall be issued until the required affidavit is filed, reasonably describing the place or thing to be searched, the things to be searched for, and "alleging briefly material facts constituting the probable cause," and substantially the offense in relation to which the search is to be made.

Section 19-29 (now § 19.1-84) provides that on complaint, supported by the required affidavit, the justice or judge "if satisfied that there is reasonable cause therefor" shall issue a warrant to search the specified place for, *inter alia*, "Lottery tickets, or materials unlawfully made, provided or procured for drawing a lottery".

Section 19-33 (now § 19.1-88) forbids an officer or other person to search without a warrant, and makes it a misdemeanor to do so, and the officer shall be liable to compensatory and punitive damages to a person aggrieved, and for a second offense his office is forfeited.

In *Hall* v. *Commonwealth*, 138 Va. 727, 733, 121 S.E. 154, 155, we expressed the view that the purpose of these statutes (then embodied in Acts 1920, ch. 345, p. 516) was to protect and enforce the rights of the citizens guaranteed to them by Article I, § 10 of the Virginia Constitution;[3] and in *Zimmerman* v. *Bedford*, 134 Va. 787, 802, 115 S. E. 362, 366, we said that their requirements were the same in substance as those contained in the Fourth Amendment to the Federal Constitution.

In *Zimmerman* the challenged affidavit for the search warrant stated that the affiant believed that Zimmerman

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[3] § 10. General warrants of search or seizure prohibited.—That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

had liquor in his possession at a named place, and that affiant had "watched his place and from the nature of the people going in and out of his premises, I am satisfied he has liquor there". We held that this affidavit contained the material facts constituting probable cause for issuing the search warrant, and sufficient to have satisfied the officer issuing the warrant that there was reasonable cause for issuing it, in that

"* * * It states that the affidavit is based on the personal observation of the affiant of the place designated and of the nature of the people going in and out of the premises. And these facts are in their character convincing evidence of the existence of probable cause (which is the same thing as reasonable cause) for the issuance of the search warrant." 134 Va. at 802, 115 S. E. at 366.

"* * * It states that the affidavit is based on the personal dence on which a search warrant may be issued "does not have to be sufficient to establish the fact that the thing sought is on the premises, but merely that the belief of the person making the affidavit that it is there is based on facts which furnish a probable or reasonable cause for such belief". 134 Va. at 802-3, 115 S. E. at 366. See also *Marshall* v. *Commonwealth*, 140 Va. 541, 552-3, 125 S. E. 329, 333, and *Dellastatious* v. *Boyce*, 152 Va. 368, 383-4, 147 S. E. 267, 272.

"What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case. * * *" *United States* v. *Rabinowitz*, 339 U. S. 56, 63, 70 S. Ct. 430, 434, 94 L. ed. 653, 659.

"It must always be remembered that what the Constitution forbids is not all searches and seizures, but unrea-

sonable searches and seizures." *Elkins* v. *United States*, 364 U. S. 206, 222, 80 S. Ct. 1437, 1446, 4 L. ed. 2d 1669, 1680.

In *United Staes* v. *Ramirez*, (2 Cir.), 279 F. 2d 712, 714, it is said that the classic statement of the law of probable cause relative to the issuance of search warrants is to be found in *Dumbra* v. *United States*, 268 U. S. 435, 441, 45 S. Ct. 546, 549, 69 L. ed. 1032, 1036.[4] The affidavit in *Ramirez* was that the affiant had reason to believe that on the described premises herein was being concealed, based on the fact that two days before he was in an apartment in the premises and there saw quantities of a white powder that he believed to be narcotics. The court was unanimous in concluding that the search warrant was in all respects valid, saying, "We have surveyed the case in the federal courts, and we find none wherein a search warrant was held invalid because of an affidavit similar to the one before us." 279 F. 2d at 715.

We hold that the affidavit in the present appeal alleged sufficient facts to constitute probable cause for the issuance of the search warrant and that the warrant issued thereon was a valid search warrant, and the search and seizure made upon its authority were in all respects lawful. It follows that the results of the search were admissible in evidence and the holding of the Supreme Court in *Mapp* v. *Ohio*, 367 U. S. 643, 655, 81 S. Ct. 1684, 1691, 6 L. ed. 2d

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[4] "In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant."

1081, 1090, that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court," is not applicable to the facts in this case.

The evidence as introduced clearly supported the finding of the trial court that a lottery was in operation on October 21, 1957, and part of it was then being conducted on the searched premises by both Nannie V. Compton and Joseph A. Chase and that the 44 items listed on said Exhibit A were used in connection with the operation.

After procuring the search warrant, Leonard J. Burnett, of the Arlington county police, and other officers, proceeded to the premises to make the search. Mrs. Compton admitted them through a back door, after ascertaining that they had a warrant. Inside they found Chase in the den, or office, behind a desk engaged in a telephone conversation. Burnett showed his badge; Chase said, "Oh, my God," and then, "Sit down, Chief, and let's talk this thing over". Burnett inquired, "Where is the work?" meaning, he said, the numbers work. Chase replied, "It's right here," pointing to a suitcase on the floor, apparently the same suitcase which the officers had seen delivered to the house a short while before the search. Burnett opened it and found therein numerous bags of numbers slips and cash totaling $1,658.08, designated as item 43 on Exhibit A. Chase told the officers that if they had been five minutes later the contents of the suitcase would not have been there. Other officers participating in the search reported that they had found adding machines and a laundry bag full of numbers slips in the basement. Chase said he had a lady guest in the house who did not know about his business and requested the officers to be as quiet as possible. Burnett told him if he cooperated they would not have to tear up anything and Chase replied, "O.K., you've got me". Thereupon they opened cabinet and desk drawers and Chase opened a safe that was there. In a cabinet

drawer they found numerous number slips and cash, totaling $3,889, identified as item 44 on Exhibit A.

Item 41 of Exhibit A, described as "One evidence bag #3 containing $6,697.68 in cash and number slips and paraphernalia," was found in a cabinet drawer with the numbers slips in with the money. Included were four envelopes, which the officer identified as being connected with the numbers business by pointing out thereon a designated code for the writer or runner and the amount of money that was turned in in each of these envelopes. Items 41, 42, 43 and 44 of Exhibit A designated the money that was seized and forfeited, amounting to $12,264.98. This and six adding machines comprise the principal value of the seized property. The remainder consisted of stationery and equipment of small value. There was evidence that all of these items were used in connection with the operation and conduct of the numbers game, which is a lottery. *Quidley* v. *Commonwealth*, 190 Va. 1029, 1038, 59 S. E. 2d 52, 56; *Hayden* v. *Commonwealth*, 203 Va. 398, 400, 124 S. E. 2d 13, 14.

Burnett, who had had extensive experience with such operations as an officer, testified that this establishment that was searched was "the last resort of the business. This is the bank. This is where the man that backs this operation is informed of what he has done and what he owes and what he made."

Photographs of the premises taken at the time of the raid showing outside doors and inside rooms with their equipment and contents, furnished strong support for such conclusion. The back door, through which the officers entered, was covered with a steel mesh similar to a grating and equipped with a double lock, and the basement windows were covered with newspapers. Every door on the inside was locked and could be opened only with a key. Chase told the officers that he had about 200 runners and that his operation was running from 4200 to 4500 plays

per day. As stated, he and Mrs. Compton both confessed their guilt.

The claim of Tri-Pharmacy to the $6,697.68, item 41 of Exhbit A, is without merit. It was based on testimony of Nannie V. Compton that she was secretary and treasurer of the company, which had its place of business in the city of Washington and that since 1954, when the company was organized, it had been her practice to bring the company's money to her house every day, then deposit some of it and put the balance in the drawer of the file to keep, along with miscellaneous money of her own, the amount of which she did not know. Her explanation was that she kept it at home rather than in the bank "in case something happened or somebody got nasty and wanted to foreclose on it. They would not be able to seize it all". There was nothing to identify it as drug store money, she said. She and a daughter of Joseph A. Chase and Calvin E. Johnson were the company's stockholders. Johnson testified that he was president and manager and that "we gave Nannie V. Compton permission to take out of the business receipts so much money—no specific amount—and she was to keep it in her home, or wherever she chose to keep it, until we accumulated a certain amount for certain plans, certain things we wanted to do". The company had no record of the amount. One of the reasons for the arrangement, he said, was to protect against lawsuits, but they had not had any lawsuits.

It is clear that the trial court was warranted in accepting the evidence for the Commonwealth that this money was used in the lottery operation. The version of these claimants was "implausible to the point of fantasy". See *Spagnuolo* v. *Bonnet, post.*

The trial court was clearly right in holding that the property described in items 1 through 44 of said Exhibit A was used in connection with the operation and conduct of a lottery and therefore forfeited to the Commonwealth.

Record No. 5444

The appeal of the United States of America in this case challenges the further holding of the trial court that the forfeiture to the Commonwealth so declared takes precedence over the claim of the United States for its tax liens on the forfeited property.

This claim was based on two assessments described in the appellant's intervening complaint, the first made October 29, 1952, before the seizure, and the second made November 2, 1957, after the seizure but before the trial court's decree of May 23, 1961. In its brief the appellant says that the date and amount of the first assessment, as well as the taxpayers against whom it was made, were incorrectly stated in its complaint.

As to the first assessment, the appellant states, and its evidence is, that on October 29, 1952, the Commissioner of Internal Revenue made an assessment of wagering excise taxes, penalties and interest in the amount of $18,794.81 against Joseph A. Chase, Wayne B. King and Elden F. King. Demand for payment was made October 30, 1952. Notice of lien was filed November 6, 1952, with the clerk of the District Court of the District of Columbia and on October 23, 1957, with the clerk of Arlington county. Appellant's brief says "Various payments have reduced the amount outstanding on this lien to approximately $2,310". A witness for the appellant testified that the amount due as of the date he was testifying, June 9, 1960, was $5,711.21 plus accrued interest. An exhibit filed by him indicates that this amount was the balance on October 14, 1958.

Section 3670 of the Internal Revenue Code of 1939, 53 Stat. 448, 26 U.S.C.A., p. 944, in effect when this assessment was made, provided that if any person liable to pay any tax fails or refuses to pay after demand, the amount shall be a lien in favor of the United States on all property belonging to such person; and § 3671 of the same

Code provided that the lien shall arise at the time the assessment list was received by the collector and continue until the liability is satisfied or becomes unenforceable from lapse of time. An exhibit indicated that the assessment was received by the collector on October 29, 1952. The position of the Commonwealth with respect to this lien is stated to be that the amount is indefinite and could not exceed the $2,310 stated in the appellant's brief to be the balance due, and that the United States had knowledge of the illegal use of the seized property and did not qualify as a lienor under § 18.1-341 of the Virginia Code, 1960 Replacement Vol.[5] (§ 18-302, Code 1950, as amended.)

There is no evidence that the United States had knowledge of the illegal use being made of the property and thus it appears that it had a properly perfected lien thereon at the time of the seizure, and under the terms of the State statute said lien has priority over the forfeiture to the extent of the balance due thereon, which must be ascertained and satisfied ahead of the rights of the Commonwealth.

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[5] § 18.1-341. Forfeiture of money, etc., drawn and property used in lottery; innocent owners or lienors.—All money and things of value drawn or proposed to be drawn by an inhabitant of this State and all money or things of value received by such person by reason of his being the owner or holder of a ticket or share of a ticket in any lottery or pretended lottery, contrary to this chapter, and all money, gambling paraphernalia, office equipment and all other personal property of any kind or character used in connection with the promotion, operation or conduct of any lottery or attempted lottery shall be forfeited to the Commonwealth and may be seized by an officer and held to await proceedings for condemnation; provided, that such forfeiture shall not extinguish the rights of any person without knowledge of the illegal use of such property who is the lawful owner or who has a lien on the same which has been perfected in the manner provided by law. The money or other personal property so forfeited shall be disposed of as provided by law.

As to the second assessment, the record shows that the Commissioner, on November 4, 1957, made a jeopardy assessment of excise taxes against Joseph A. Chase and Nannie V. Compton in the sum of $75,167.39, including interest, and notice of lien was filed on November 4, 1957, with the clerk of Arlington county.

Section 6322 of the Internal Revenue Code of 1954, 68A Stat. 779, 26 U.S.C.A., p. 449, then in effect, provided that the lien for taxes created by § 6321 of that Code should arise at the time the assessment was made. The Commonwealth's contention with respect to this assessment is that the forfeiture of the property to the Commonwealth under § 18.1-341, *supra*, occurred when the property was seized; that the owner was at that time divested of any right therein and that the forfeiture proceeding was required not to complete the forfeiture but to prove the illegal use for which the forfeiture was suffered.

We agree with the argument of the appellant that if the Commonwealth's claim was contingent or inchoate at the time the appellant's lien attached, *i.e.*, on November 4, 1957, then appellant's lien takes precedence. *United States* v. *Waddill Co.*, 323 U. S. 353, 65 S. Ct. 304, 89 L. ed. 294; *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, 71 S. Ct. 111, 95 L. ed. 53; *United States* v. *Lawler*, 201 Va. 686, 112 S. E. 2d 921.

Section 18.1-341, *supra*, as noted, provides that property used in connection with the operation of a lottery shall be forfeited to the Commonwealth and may be seized by an officer and held to await proceedings for condemnation. Chapter 10 of Title 29 of the 1950 Code, pursuant to which the information of February 10, 1958, was filed,* provided for the enforcement of forfeitures under § 18.1-341, *supra*. Sections 29-214, *et seq.*, in said Chapter 10, provided for

* Now Chapter 15 of Title 19, §§ 19.1-358, *et seq.*, 1960 Replacement Vol.; Acts 1960, ch. 366.

the filing of an information to enforce the forfeiture and for the procedure thereon, and § 29-224 provided that if the forfeiture be established, "the judgment shall be that the property be condemned as forfeited to the Commonwealth," sold and disposed of as provided in succeeding sections.

In *Hall* v. *Commonwealth, supra,* we held that whiskey and containers forfeited to the Commonwealth under the Virginia Prohibition Law, Acts 1918, ch. 388, were not the property of the defendant at the time they were seized by the officers, "the right to them having already vested in the Commonwealth". 138 Va. at 743, 121 S. E. at 159.

United States v. *Stowell,* 133 U. S. 1, 10 S. Ct. 244, 33 L. ed. 555, was an information proceeding for the forfeiture of property seized under Federal statutes relating to illegal distilling operations. The question was as to the priority of the government's right to property seized on the premises as against Stowell's prior mortgage and bills of sale. In giving precedence to the forfeiture the court said:

"By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, *the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation;* the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed, and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations ,even to purchasers in good faith." (Italics added.)

That principle was applied in *United States* v. *One 1957 Model Tudor Ford,* (1958), 167 F. Supp. 864, 866, to give

priority to the government's right by forfeiture to an automobile over an existing lien created by State statute. The court said:

"The forfeiture granted by 26 U.S.C.A. §§ 3116 and 3321, takes place upon the commission of the forbidden act, and the statute operates to transfer the title at once to the government," citing Supreme Court cases.

Spaynuolo v. *Bonnet*, 16 N. J. 546, 109 A. 2d 623, involved the title to $50,000 in cash seized by police officers in a raid on the headquarters of a lottery operation. The money was seized by the sheriff on March 2, 1951, eighteen days prior to the effective date of the government's lien under a jeopardy assessment for income taxes. The government contended there, as here, that the county of Essex had nothing more than an inchoate lien or potential contingent property right in the money until the order of forfeiture dated May 5, 1954. The court held that the forfeiture took precedence over the government's lien and said:

"* * * Where a forfeiture is absolute under the statute, as it is here, the judgment of condemnation or forfeiture when entered relates back to the commission of the wrongful act and takes date from the wrongful acts, not from the date of sentence or decree. * * *." 16 N.J. at 559, 109 A. 2d at 630

"The title and possession of the County of Essex was not that of a creditor or a judgment creditor but a title and possession acquired by an exercise of sovereign power, and therefore the case of *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, 71 S. Ct. 111, 95 L. ed. 53 (1950), is not in point." 16 N. J. at 560-1, 109 A. 2d at 631.

We hold that the forfeiture declared by § 18.1-341 took effect at the time of the seizure, on October 21, 1957, and the right to the property seized then vested in the Commonwealth, subject by the terms of the statute to the lien of

the United States under the assessment of October 29, 1952, but prior to and taking precedence over the assessment of November 4, 1957.

We therefore reverse the decree of the trial court with respect to its adjudication that the forfeiture takes precedence over the line of the United States under the assessment of October 29, 1952, but affirm said decree in all other respects and remand the case to the trial court with direction to ascertain the balance due the United States under said 1952 assessment, and to take further proceedings under the forfeiture and dispose of the property as required by law and as herein determined.

Reversed in part, affirmed in part and remanded.